FALL 2015

EDUCATION LAW NEWSLETTER

Borden Ladner Gervais

ON SEPTEMBER 1ST THE OMBUDSMAN BEGAN TAKING COMPLAINTS ABOUT SCHOOL BOARDS

As of September 1, 2015, the Ontario Ombudsman may now take complaints pertaining to the province's 73 school boards. The expansion of the Ombudsman's mandate was granted under the provisions of Bill 8, the *Public Sector and MPP Accountability and Transparency Act, 2014*. The new law was proclaimed on March 16, 2015.

Bill 8, which has staggered dates for implementation, extended the Ombudsman's scrutiny to the broader public sector. It will enable the Ombudsman to take complaints about municipalities and universities as of January 1, 2016.

Effective September 1, 2015, anyone with an unresolved concern about a school board, including parents, family members, school staff, trustees, teachers or special interest groups can contact the provincial Ombudsman by using an online complaint form at www.ombudsman.on.ca.[1] A complaint can also be filed by phone or e-mail.

Effective September 15, 2015, the Provincial Government appointed Barbara Finlay as the province's acting Ombudsman.

The former Ontario Ombudsman, André Morin, has stated that the Ombudsman is an office of last resort and that issues should be resolved locally, where possible.[2] Mr. Morin indicated that school boards should reinforce their own complaint and accountability mechanisms. If a person has not already raised his/her complaint with a school board complaint process, the Ombudsman will refer the individual back to that process.

[1] Ontario Ombudsman, Newsroom, "Ombudsman begins taking complaints about school boards September 1", Press Release, 2015, online: <http://www.ombudsman.on.ca/Newsroom/Press-Release/2015/Ombudsman-beginstaking-school-board-complaints.aspx>.

[2] *Ibid.*

The Ombudsman has the authority to conduct investigations and make recommendations. Under the *Ombudsman Act,* these recommendations are not binding. The Ombudsman does not have authority to overturn decisions made by school boards, nor can she issue penalties.

From a school board perspective, the Ombudsman will be able to investigate complaints about the administrative conduct of school boards that have not been resolved by local complaint or appeal processes. These may include concerns about special education supports, school board policies, customer service provided by board staff and other matters within the purview of individual school boards.[3]

The Ombudsman has significant investigation powers, including the authority to issue summonses.

It should be recognized that the Ombudsman has the discretion not to investigate a complaint.[4] In exercising her discretion, the Ombudsman may consider, among other things, the age of the complainant, whether the complainant has sufficient personal interest in the subject matter, whether or not there is an alternative remedy for the complaint, if the complaint is considered frivolous or vexatious or if the matter involves a broader public policy issue. Each complaint is assessed on a case-by-case basis to determine if an investigation is warranted.[5]

COMPLAINT PROCESS

Following the Bill 8 amendments, anyone with an unresolved concern about a school board – including parents and family members, school board staff and trustees, teachers or special interest groups – can contact the Ombudsman by using an online complaint form. The following process will apply to complaints made against school boards:

1. The Ombudsman will assess all complaints and refer them to local school board officials for quick resolution, wherever possible.
2. If local mechanisms are unsuccessful, the Ombudsman may attempt resolution and may contact the school board for more information.
3. If an investigation is necessary, the school board will receive written notice and will be required to provide relevant information and documents.
4. If the Ombudsman makes recommendations, the school board will have a chance to respond before any report is made public.
5. The Ombudsman will follow up on relevant recommendations to ensure they are implemented and have the desired effect.

Under the *Ombudsman Act*, all school boards are required to co-operate with the Ombudsman's office when responding to a complaint. The Ombudsman has significant investigation powers, including the authority to issue summonses, require evidence under oath or inspect premises. Under the *Ombudsman Act,* it is an offence to mislead the Ombudsman or obstruct an Ombudsman investigation.

There is no charge to complain to the Ombudsman and a school board that is the subject of a complaint will not be reimbursed for the costs incurred in responding to an investigation.

Under the *Ombudsman Act*, all complaints, including the identity of the complainant are confidential and investigations are conducted in private.[6] However, depending on the nature of the complaint, it may be necessary for a person to consent to being identified to the specific school

---

[3] Ontario Ombudsman – MUS FAQ, "MUS – Municipalities, Universities and School Boards – Frequently Asked Questions", online: <https://ombudsman.on.ca/About-Us/MUS-FAQ.aspx>.

[4] *Ibid.*

[5] *Ibid.*

[6] *Ibid.*

board so that his/her complaint can be thoroughly reviewed and investigated.

Under Bill 8, section 207 of the *Education Act* has been amended with respect to school board meetings that are held in private. The new provision requires that a meeting of a school board be closed to the public when the subject matter involves an ongoing investigation under the *Ombudsman Act* respecting the board.

Of note is the fact that the Bill 8 amendments specifically provide that the Ombudsman is to exercise her authority with respect to school boards in a manner that is consistent with and respectful of the rights and privileges granted under section 93 of the *Constitution Act, 1867* and section 23 of the *Canadian Charter of Rights and Freedoms*. It remains to be seen how complaints involving denominational rights will be resolved.

The Ombudsman is an independent office of the Ontario legislature that resolves and investigates individual and systemic issues relating to the administration of provincial government services and school boards. It handled 23,153 complaints in 2014/2015.

It should be recognized that five other ombudsmen in provincial governments across Canada also oversee school boards.

We understand that since September 1st, there have already been a number of complaints to the Ombudsman's office made against Ontario school boards.

BEST PRACTICES

Although the Bill 8 amendments have newly expanded the Ombudsman's powers over school boards, the Act intends for the Ombudsman to be an office of last resort and that issues be resolved locally, wherever possible. Therefore, it is of increased importance that school boards reinforce and utilize their own complaint and accountability mechanisms.

In this regard, we recommend that school boards have detailed and clear complaint or appeal processes in place for parents, students, staff or third party complainants. These complaint procedures should be in writing and fully accessible to the school board community. They should set out internal processes to resolve disputes involving the school board or individual schools.

We also recommend that school boards have designated personnel in place to co-ordinate the response to a concern or complaint received by the Ombudsman's office. The coordinator should be aware of the relevant provisions of the *Ombudsman Act*, the investigation and disclosure process under the legislation, and the scope and authority of the Ombudsman. This individual should be the contact person for the school board in properly responding to an inquiry from the Ombudsman's office. Ideally, many of the concerns or complaints raised by the Ombudsman can be resolved in a prompt and timely manner.

Where an investigation is necessary, the school board coordinator should review the written notice from the Ombudsman's office and prepare a timely response, which may include the provision of relevant information and/or documents. The coordinator should work in consultation with other school board personnel, including supervisory officers and principals, in organizing the Board's response.

Overall, it is recommended that school boards should have processes and procedures in place to respond to concerns or complaints raised by the Ombudsman's office in a prompt and thorough manner.

We recommend that school boards have detailed and clear complaint or appeal processes in place.

Eric M. Roher
416.367.6004
eroher@blg.com

Maria Gergin
416.367.6449
mgergin@blg.com

JOB ACTION RAMPS UP FOR CUPE AND ETFO

On September 29, 2015, the Canadian Union of Public Employees ("CUPE"), which represents 55,000 education workers in the provnce, moved into Phase 2 of its Work-to-Rule plan. The Work-to-Rule campaign involves a range of school board employees, such as custodial and maintenance staff, clerical workers, educational assistants, early childhood educators and library workers.

The Work-to-Rule plan outlines a number of instructions for each CUPE classification. For example, among other things, educational assistants are instructed:

- to undertake lunch duty, hall duty, yard or stair duty for special educational students in their care;
- not to prepare materials of any kind for class;
- not to deliver attendance sheets; and
- not supervise student detention.

School boards are developing plans to ensure that students are properly supervised.

With respect to custodial and maintenance workers, under Phase 2, they are instructed:

- not to cut grass, tree trimming or fall clean-up, unless a health and safety risk;
- not to sweep hallways or entrances;
- not to clean chalkboards/white board or empty pencil sharpeners; and
- not to do minor maintenance, such as small repairs or painting.

CUPE has been in a legal strike position on central issues since September 10, 2015. Negotiations with the province and the trustee associations broke down on September 28th.

In response to the Work-to-Rule campaign, school boards are developing plans to ensure that students are properly supervised and that school facilities are safe, clean and secure. There is an expectation that this job action will escalate over the next few weeks creating some uncertainty in Ontario schools with CUPE staff.

ELEMENTARY TEACHERS' FEDERATION OF ONTARIO

On September 11, 2015, talks broke off with the Elementary Teachers' Federation of Ontario ("ETFO") after the province made an offer it described as parallel to what other teachers unions have accepted.

ETFO, representing 78,000 public elementary teachers, has been in a legal strike position since May 2015.[1]

On September 21, 2015, ETFO escalated its work-to-rule strike action. ETFO has threatened to begin rotating strikes in October and to scale back non-teaching activities, asking teachers to demonstrate solidarity on "Wynne Wednesdays". Under Phase 3 of ETFO's campaign, on "Wynne Wednesdays" the teachers will:

- Refrain from any activities that take them away from their classrooms;
- Demonstrate union solidarity by wearing ETFO buttons, caps or T-shirts or a union colour;
- Send messages to the Minister of Education or the Ontario Public School Board Association (OPSBA) about the

[1] Kendra Mangione, "Ont. Elementary teachers' union resumes contract negotiations", *CTV Barrie News,* September 1, 2015, online: <http://barrie.ctvnews.ca/mobile/ont-elementary-teachers-union-resumes-contract-negotiations-1.2543015>.

importance of "fair and reasonable collective bargaining";

- Engage in planned lobbying activities including pickets, rallies and letter-writing campaigns.[2]

Phase 3 of ETFO's campaign involves a long list of changes, including "Wynne Wednesdays" when teachers will not work outside the classroom. They will also participate in pickets, rallies, letter-writing campaigns and wear ETFO T-shirts, buttons and hats.

As part of Phase 3 of the job action, ETFO is telling its members not to fill in for absent teachers, take on extra duties during scheduled preparation time or update classroom websites, blogs or newsletters.

ETFO is also directing its members not to participate in any in-school meetings or professional learning activities on PA days, opting instead to use the time for their own professional development in the classroom.

In addition, ETFO is telling its members not to respond to e-mail, electronic or phone communication from administrators, unless it involves the safety of others, absences, day plans or occasional teacher assignments.

ETFO has released a plan for Phase 4 of the work-to-rule campaign, which will begin in October if a deal is not reached. Phase 4 will include rotating strikes "if sufficient progress has not occurred".[3]

ONTARIO SECONDARY SCHOOL TEACHERS' FEDERATION

Ontario Secondary School Teachers' Federation ("OSSTF"), representing 60,000 public high school teachers reached a tentative deal with the Province on August 20, 2015. The teachers' union leaders endorsed the tentative contract on August 22nd.[4]

OSSTF has suspended its strike action plans and teachers will resume extra-curricular activities.[5] OSSTF members ratified the agreement on September 18, 2015. The agreement does not cover support workers, such as educational assistants, social workers and custodians, who are also OSSTF members. Their talks are continuing at the central table with the province and school board associations.

OSSTF has negotiated a series of small salary increases totalling 2.25 percent over the next two years: a one-time lump sum payment of one percent for all teachers and occasional teachers for the upcoming school year; one percent salary increase for teachers as of September 1, 2016 and another one-half percent halfway through the 2016/2017 school year.[6]

OSSTF has negotiated a series of small salary increases.

OSSTF members will be allowed to take sick leave for medical or dental appointments.[7] In addition, long-term occasional teachers will double their maximum allowable sick days from 60 to 120. Teachers will also get one additional P.A. day. Teachers obtained greater leeway to use their professional judgment, including a commitment to consult them about any changes to student grades.[8]

---

[2] Kendra Mangione, "Ont. Elementary teachers to launch Phase 3 of work-to-rule", *CTV News*, September 18, 2015, online: <http://toronto.ctvnews.ca/ont-elementary-teachers-to-launch-phase-3-of-work-to-rule-1.2569818>.

[3] *Ibid.*

[4] Selena Ross, "Ontario teachers' union endorse tentative agreement with schools", *The Globe and Mail,* August 22, 2015, online: <http://www.theglobeandmail.com/news/national/ontario-teachers-union-endorsetentative-agreement-with-schools/article26064887/>.

[5] *Ibid.*

[6] Andrew Francis Wallace, "Ontario high school teachers to get increase in pay, not class size", *The Star,* August 22, 2015, online: <http://www.thestar.com/yourtoronto/education/2015/08/22/ontario-high-school-teachers-to-get-increase-in-pay-not-class-size.html>.

[7] *Supra,* Note 8.

[8] *Ibid.*

The province had indicated that it would permit only a "net zero" contract in which salary increases would be offset with cost savings. A senior government official stated that the OSSTF agreement "is consistent with the government's net zero bargaining framework."[9]

ONTARIO ENGLISH CATHOLIC TEACHERS' ASSOCIATION

On August 25, 2015, Education Minister Liz Sandals announced that the province and the Ontario Catholic School Trustees' Association had reached a tentative agreement with the provinces 34,000 English Catholic teachers.[10]

The tentative deal was similar to the terms reached by their public high school counterparts. Local OECTA presidents endorsed the agreement on September 1, 2015. OECTA members ratified the agreement on September 17th.[11]

The agreements reached with OSSTF, OECTA and the French-language teachers could put significant pressure on the other unions to settle.

Similar to the OSSTF agreement, the tentative deal gives OECTA members a 2.25 percent salary increase over the next two years. The agreement also provides an added professional development day and keeps much of the contract the same, including a teacher's right to choose which level of diagnostic test to use, and how often.[12]

As with the tentative deal with OSSTF, Minister Sandals said that the OECTA agreement meets the province's "net zero" requirement – meaning any extra costs will be funded by savings elsewhere in the contract.[13] Kathy Burtnik, President of the Ontario Catholic School Trustees' Association, stated that "working within the fiscal restraints of the current bargaining framework was challenging, but surmountable with the concerted efforts of all parties.[14]

An agreement with OECTA will allow all 29 Catholic school boards, which includes both Catholic elementary and secondary schools, to operate without labour unrest for the next two years.

In addition, on September 16, 2015, the French-language teachers, representing 10,000 teachers, reached a tentative deal.

CONCLUSION

Notwithstanding the three tentative agreements with OSSTF and OECTA and the French-language teachers, the province and trustees' associations are diligently working to reach deals with ETFO, CUPE and other support workers. It should be recognized that both ETFO and CUPE are in legal strike positions. The province continues to face job action in the education sector. In particular, CUPE represents custodians in many school boards who maintain and clean school facilities. A strike or other job action by CUPE members could have a significant impact on the operation of schools. It should also be recognized that the agreements reached with OSSTF, OECTA and the French-language teachers could put significant pressure on the other unions to settle.

Under the provisions of the *School Boards Collective Bargaining Act, 2014,* there is a voting process in respect of collective bargaining by an employer bargaining agency. On September 18, 2015 OPSBA ratified the tentative settlement reached with OSSTF and OCSTA ratified the tentative deal reached with OECTA.

Eric M. Roher
416.367.6004
eroher@blg.com

---

[9] *Ibid.*

[10] Adrian Morrow and Selena Ross, "Ontario strikes tentative deal with English Catholic teachers' union", *The Globe and Mail*, August 25, 2015, online: <http://www.theglobeandmail.com/news/national/education/ontarios-english-catholic-teachers-union-province-reach-tentative-agreement/article26088456/>.

[11] Louise Brown, Kristin Rushowy, "Catholic teachers hammer out tentative deal with province", *The Star,* August 25, 2015, online: <http://www.thestar.com/yourtoronto/education/2015/08/25/ontario-makes-deal-with-english-catholic-teachers.html>.

[12] Louise Brown, "Tentative deal gives Catholic secondary teachers raises similar to public boards", *The Star*, September 2, 2015, online: <http://www.thestar.com/yourtoronto/education/2015/09/02/tentative-deal-gives-catholic-secondary-teachers-raises-similar-to-public-boards.html>.

[13] *Ibid.*

[14] *Supra,* Note 15.

CRIMINAL CONSEQUENCES OF STUDENT "SEXTING"

Recent criminal cases and changes to the *Criminal Code* highlight the consequences that can result from sharing or eliciting 'sexts' from others. These developments suggest that sharing the intimate images of others without consent can lead to serious consequences, including criminal charges.

In a decision dated December 2, 2014 from the Provincial Court of British Columbia, *R v SB et al*[1], three fourteen year olds were found guilty of criminal harassment[2] after encouraging female youths to send them sexual images. As the court described,

> At times the males were persistent and persuasive in their attempts to elicit photos from the females. At other times the females appear to provide the images more readily. The "chats" by the males to the females were at times immature and demeaning. It is these "chats" which have resulted in the charges presently before the court.[3]

The accused then shared the pictures with others in a manner described as "similar to the trading of hockey cards".[4] A police investigation later revealed that thirty-two female youth and twenty-five male youth were involved in sending and sharing intimate photos to one another.

Initially, the youth were charged with "distributing child pornography", which resulted in national media attention. For a time, the students were known within their schools to be "charged with distributing child pornography and part of a 'child pornography ring'".[5]

The judge in this case took particular issue with the youths' "persistent and persuasive communication…in an attempt to obtain disclosure of the photos and their distribution without their consent".

Finding the students guilty of criminal harassment, the judge remarked,

> I also accept that the distribution of such photos is a common practice amongst youth today in their attempts to learn of and struggle with their own sexuality. This court does not condone, however, the persistent and persuasive efforts, including the use of demeaning language, of these youths to obtain such photos.[6]

Ultimately, the judge ordered six months of severe restrictions to the students' freedom before they would have their convictions removed from their records. During this six-month period, the students were prohibited from initiating communication with the victims, using electronic

The accused shared pictures with others in a manner described as "similar to the trading of hockey cards."

---

1 *R v SB et al,* 2014 BCPC 279 [R v SB].

2 *Criminal Code of Canada,* RSC 1985, c C-46, s 264 [*Criminal Code*].

3 *R v SB, supra* note 1 at para 5.

4 *Ibid* at para 6.

5 *Ibid* at para 9.

6 *Ibid* at para 30.

devices that could access the internet, and were required to attend counselling, regularly attend school or work, apologize to the victims, and complete twenty hours of community service.[7]

In a decision dated July 8, 2015, *R v CNT*,[8] the Provincial Court of Nova Scotia dealt with a youth who had been found with a number of sexually explicit images of young females on his phone. As the court described,

> Investigators found a collage of images of young female acquaintances of C.N.T.'s – including a number depicting his girlfriend – aging in range from 14 to 16 years old, in sexually explicit poses. These young victims were interviewed by police. They said that C.N.T. had coaxed them to take sexualized "selfies" and send them to him. There were other child-pornographic images found on C.N.T.'s smartphone which police were unable to identify. C.N.T. admitted to doing this. He also admitted to sharing some of the images with an adult, a Mr. M.[9]

"Offences of this nature are . . . psychological time bombs."

Of concern, the accused had been more aggressive with his requests to other individuals.

> Another series of texts, this time between C.N.T. and one of his victims, records C.N.T. as repeatedly extorting – and I use that term in the sense of C.N.T.'s persistence – sexualized images from the victim by telling her he would not otherwise be her boyfriend.[10]

As a result of these alleged facts, the accused was charged with possession of child pornography, and pled guilty.

Although the victims had not suffered physical harm, the court felt that the accused's acts were serious:

> Offences of this nature are, yes, psychological time bombs, and no one who commits this sort of crime can claim ignorance. The dangers inherent in cyberbullying, cyberstalking, sexting, revenge porn and other similar offences against the person are discoursed widely on the internet, in school curricula, the media, youth-oriented community groups, social-service agencies, and within family homes.
>
> Accordingly, there is no doubt in my mind that what C.N.T. did was a crime of violence.

The court felt that this crime was significant enough to warrant a punishment that was more severe than usual. It did not feel that the typical sentence for this offence, probation, would be enough of a "meaningful consequence" for the accused. The court felt that jail time was required to effectively deter this type of crime.[11]

As the youth had pled guilty, had no prior criminal record, and acknowledged the harm that he caused, the court ordered a deferred jail sentence of six months for the charge of child pornography, followed by a year under probation. The court ordered the youth to attend counselling and provide a DNA sample to police, and restricted the accused's ability to access the internet and seized the accused's smartphone.

Attempting to respond to public safety concerns, including those raised during the Rehtaeh Parsons and Amanda Todd cases, the Federal Government of Canada passed Bill C-13, the *Protecting Canadians from Online Crime Act*[12]. Significantly, this act creates a new offence related to the sharing of sexualized photos.

As of March 9, 2015, it is a crime to publish, distribute, transmit, sell, make available or advertise an "intimate image" of a person without

---

[7] *Ibid* at paras 31-32.
[8] *R v CNT,* 2015 NSPC 43.
[9] *Ibid* at para 1.
[10] *Ibid.*
[11] *Ibid* at para 17.
[12] *Protecting Canadians from Online Crime Act,* SC 2014, c 31.

that person's consent.[13] If found guilty, individuals may be sent to jail for up to five years. "Intimate image" has an extensive definition:

> *intimate image* means a visual recording of a person made by any means including a photographic, film or video recording,
>
> a) in which the person is nude, is exposing his or her genital organs or anal region or her breasts or is engaged in explicit sexual activity;
>
> b) in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy; and
>
> c) in respect of which the person depicted retains a reasonable expectation of privacy at the time the offence is committed.[14]

Schools and school boards should be aware of the serious psychological and legal consequences that can result from 'sexting' amongst their students, and the potential harm that can result. Students should be reminded that the often impulsive decision to send intimate pictures to others is nearly impossible to take back, and can have long-lasting consequences.

John Hunter
Student-at-Law
jhunter@blg.com

[13] *Ibid,* s 3; *Criminal Code, supra* note 2, s 162.1(1).
[14] *Criminal Code, supra* note 2, s 162.1(2).

VIDEO SURVEILLANCE IN SCHOOLS: BALANCING SAFETY AND PRIVACY

Recent Ontario decisions emphasize the need for school boards to develop policies and procedures with respect to video surveillance.

School boards everywhere are faced with the difficult task of balancing the safety of students, staff, volunteers and community members on school property with respect for privacy and personal information. Recent decisions from Ontario emphasize the need for school boards to develop policies and procedures with respect to video surveillance that comply with applicable legislation and then carefully follow them.

Recently, two decisions emanating from two different legal contexts were released with respect to video surveillance at schools. The first decision relates to a grievance brought by a school custodian who was terminated after being caught on camera smoking marijuana while on duty in the Ottawa-Carlton District School Board (the "Ottawa-Carlton Board"). The second decision arises from a privacy complaint brought before Ontario's Information and Privacy Commissioner

(the "Commissioner") by a parent whose child attended high school St. Thomas Aquinas Catholic School (the "School"), operated by the Halton Catholic District School Board (the "Halton Catholic Board").

OTTAWA-CARLTON DISTRICT SCHOOL BOARD GRIEVANCE

An arbitration award dated May 19, 2015 addressed video surveillance in the labour context. In *Ottawa-Carlton District School Board OSSTF, District 25 Plant Support Staff* [1], the grievor was a custodian for a public school who was terminated after being caught on video surveillance smoking marijuana beside the school during a shift. He was wearing his uniform identifying him as an employee of the Ottawa-Carlton Board. The custodian had received training about drug use and smoking which put him on notice that the Ottawa-Carleton Board had a "zero tolerance" policy for the use of controlled or restricted drugs. The Ottawa-Carleton Board also had an extensive policy and procedure regarding video surveillance.

The arbitrator stated that there must be a balancing of an employee's right to privacy with the employer's operational interests.

In reaching a decision, Arbitrator Paula Knopf examined two questions: (1) In what situations surveillance may be undertaken; and (2) Whether or not the Ottawa-Carleton Board's actions were in accordance with jurisprudence in the area. The arbitrator stated that there must be a balancing of an employee's right to privacy with the employer's legitimate operational interests. Ultimately, whether video surveillance will be admitted as evidence in a labour arbitration depends on the following:

- Was it reasonable, in all the circumstances, to request surveillance?
- Was the surveillance conducted in a reasonable manner?
- Were other, less intrusive, alternatives open to the employer to obtain the evidence sought?

The arbitrator began by stating that the custodian had no reasonable expectation of privacy at the time he was recorded smoking marijuana given, for example, his location in a public space next to the school where passers-by could observe him. The arbitrator further concluded that the Ottawa-Carleton Board had reason to request surveillance because of credible reports that employees were smoking marijuana on duty and on school premises. Specifically, the Board received a report from an Acting Evening Supervisor in the facilities department, Michael Davidson, stating that he had answered his cell phone's ring and then overheard a conversation between one of the Board's evening custodians at Barrhaven Public School and another unidentified man. The phone call was believed to be a "pocket dial", but Mr. Davidson continued to listen to the conversation and overheard the custodian saying there would not be enough drugs that night and they would be "on their own." Mr. Davidson assumed that they may be talking about something that might be happening during work hours that evening and reported it to his supervisor.

In addition, the Board received a request from a "floater" custodian that he not be reassigned to Barrhaven Public School because he had previously been invited to participate in the use of marijuana at that site by other custodians. The "floater" custodian described the use of marijuana at the school as a "ritual" and expressed concern about his job. He also gave specifics of times and locations where marijuana was being used regularly by custodial staff, both on and adjacent to the school property.

The arbitrator stated that "even if there was an infringement on the employees' privacy, it did not

[1] *Ottawa-Carleton District School Board v Ontario Secondary Teachers' Federation, District 25 Plant Support Staff,* 2015 CanLII 27389 (ONLA).

do so to such an unreasonable degree that the surveillance would warrant a label of impropriety…" Therefore, the video surveillance was generally conducted in a reasonable manner, especially taking into account that it lasted for only three days and the video recording was only taken of the employees smoking marijuana, but no one else. Finally, the arbitrator concluded that less intrusive alternatives were sought, but were ultimately unsuccessful. For example, after reporting what he had overhead on the phone, Mr. Davidson was instructed to go onto the roof of the high school approximately half a kilometer away from Barrhaven Public School to see if he could get a clear view of the school or adjacent grounds. However, Mr. Davidson reported that he could not find a good vantage point and, as such, this matter of surveillance was insufficient.

Second, the arbitrator examined whether video surveillance evidence should be admissible at a hearing. In doing so, the arbitrator questioned whether the Ottawa-Carleton Board's use of video surveillance was in accordance with its own video surveillance policy and procedures. Namely, the arbitrator raised concern that the rationale for conducting video surveillance was not properly documented and a third party provider was not made aware of or required to comply with the Ottawa-Carleton Board's own privacy rules. The arbitrator held that these were minor procedurals errors, which caused no serious prejudice to the employee and, therefore, the evidence was not ruled inadmissible.

HALTON CATHOLIC DISTRICT SCHOOL BOARD PRIVACY COMPLAINT

In a decision dated March 11, 2015, the Commissioner considered whether the Halton Catholic Board's video surveillance system accorded with the privacy protection rules set out in the *Municipal Freedom of Information and Protection of Privacy Ac*t (the "Act").[2] Among other things, the Act sets out rules relating to the collection, notice, use, disclosure, security, and retention of personal information. The Commissioner's findings are outlined in a Privacy Compliance Report[3], which also relied on the Commissioner's *Guidelines for Using Surveillance Cameras in Schools* (the "Guidelines").[4]

The Commissioner was asked to determine if the Halton Catholic Board's video surveillance constituted a breach of subsection 28(2) of the Act. Subsection 28(2) of the Act states:

> No person shall collect personal information on behalf of an institution unless the collection is expressly authorized by statute, used for the purposes of law enforcement or necessary to the proper administration of a lawfully authorized activity.

First, the Commissioner determined that the recorded images of identifiable individuals collected through the video surveillance cameras located at the School constituted "personal information" as defined by the Act.

Second, the Halton Catholic Board argued that the video surveillance was "necessary to the proper administration of a lawfully authorized activity." Specifically, the Halton Catholic Board argued, and the Commissioner agreed, that the Halton Catholic Board was lawfully authorized by the *Education Act* to operate the school, including responsibility for the safety and security of students and property. The Commissioner emphasized, however, that the video surveillance must be necessary and not merely helpful to the proper administration of the school. On this point, the Commissioner held that

The arbitrator questioned whether the Board's use of video surveillance was in accordance with its own video surveillance policy.

[2] R.S.O. 1990, c. M.56.

[3] *Halton Catholic District School Board (Re),* 2015 CanLII 13372, Privacy Complaint MC13-46 (IPC).

[4] A copy of the Guidelines can be found at: https://www.ipc.on.ca/english/Resources/Discussion-Papers/Discussion-Papers-Summary/?id=412.

the Halton Catholic Board did not meet its obligation to ensure the video surveillance was necessary for several reasons, including:

- The Halton Catholic Board did not, in practice, adhere to its own privacy policy and the Guidelines;
- The Halton Catholic Board did not have measures in place to adequately evaluate the necessity and utility of the video surveillance system on an ongoing basis; and
- The implementation of the video surveillance system was pre-emptive as there was little indication before the Commissioner that there were demonstrative security issues at the school prior to the installation of the video cameras.

Finally, the Commissioner examined several additional issues related to the Halton Catholic Board's obligations under the Act. In doing so, it made the following recommendations:

- That the Halton Catholic Board conduct an assessment of the video surveillance system at the school in a manner consistent with the Act, the Halton Catholic Board's video surveillance policy and the Guidelines and then ensure ongoing compliance;
- That the Halton Catholic Board explore and, if feasible, implement measures that automatically record user activity with respect to the access and use of the video surveillance system instead of relying on user self-reporting;
- That the Halton Catholic Board undertake to have all relevant staff and service providers sign a confidentiality agreement with regards to access to the video surveillance system; and
- That the Halton Catholic Board revise its Policies, Procedures and Guidelines to reflect the specific timelines for retaining information from the video surveillance system that it has used.

The Commissioner recommended that all relevant staff sign a confidentiality agreement regarding access to the video surveillance system.

CONCLUSION

Both decisions confirm the importance of effective policies and procedures on video surveillance. In addition, they emphasize the importance of ensuring that such policies and procedures are followed in practice. The Commissioner's Guidelines provide a useful tool for school boards seeking to install video surveillance or conduct a privacy impact assessment and may be consulted when developing policies and procedures.

School boards should be aware of the privacy implications of engaging in video surveillance on school property, and should always consider the reasonableness of the surveillance and whether there are alternative means of achieving a safe and secure environment for students, teachers, staff, parents and community members.

Bethan Dinning
416.367.6226
bdinning@blg.com

EDUCATION ASSISTANT'S HUMAN RIGHTS APPLICATION DISMISSED AS NO REASONABLE PROSPECT OF SUCCESS

In a decision dated April 21, 2015, the Human Rights Tribunal of Ontario dismissed an application brought by an Education Assistant against the York Region District School Board on a preliminary basis as the application had "no reasonable prospect of success."

In *Adegorite v. York Region District School Board,* 2015 HRTO 498, the applicant was a 36-year-old Black man who had been working for the school board on a casual basis since 2010. While he was working at a secondary school in December 2013, the applicant surreptitiously obtained the phone number of a 16-year-old female student attending the school. While the student was not looking, the applicant picked up her phone and memorized her phone number. Later that same day, the applicant called her several times. The student did not recognize the phone number and did not answer; she sent a text message asking "Okay, who is this?". The applicant wrote back "Lol now u curious! Trouble finder! Lol." and sent a message identifying himself, as well as other subsequent text messages. The student responded to very few of the applicant's messages, but when she responded assertively, he would call her a "feisty woman".

The applicant told the student in the messages that he had been observing her at school and he asked about her work. The applicant also asked the student several times in his messages not to tell anyone that they were messaging, and hoped that she was "mature enuf" to know that she should not tell anyone they were texting. His final text, sent at 11:28 pm, said he was "not trying to have anything secret" with her, but people might get the wrong idea. The applicant deleted all the messages from his phone.

A few days after the exchange of text messages, the student met with the school counsellor and principal and showed them the messages, which she had saved on her phone. The student told the principal that the messages made her uncomfortable and that she tried to respond in an "unpleasant and unencouraging" manner. The school undertook an investigation in response to the student's complaint.

Further to her investigation, the principal interviewed the applicant and obtained a written statement from him. The applicant alleged that he took the student's cell phone number because he was concerned for her. Apparently the applicant had knowledge that the student's ex-boyfriend was recently released from prison and the applicant was worried she would be contacted by him. The applicant stated that he wanted to see if the student would answer her phone if she received a call from an unknown number. The principal suspended the applicant pending the completion of her internal investigation.

Upon completion of the investigation, the school board sent a letter to the applicant notifying him that his behaviour amounted to professional misconduct and his employment was terminated with just cause. The principal also referred the matter to the Children's Aid Society and police, in accordance with her statutory duties.

The applicant alleged that the school board ignored its protocols and policies in terminating his employment.

The applicant initially responded to the school board by letter admitting a "mistake", but claimed the student showed "an unhealthy attachment" to him, and that she felt "rejected" by him.

Ultimately, the applicant filed an application with the Human Rights Tribunal alleging that the school board discriminated against him on the basis of his race and sex, and that his termination was a reprisal. The applicant alleged, in part, that the school board ignored its protocols and policies in terminating his employment without imposing progressive discipline; the school board implied unintended meaning when reading his text messages because he is black and male; and he alleged that if a white female education assistant sent similar messages, her employment would not have been terminated.

The Tribunal found that there was no reasonable prospect that the applicant would be able to prove on a balance of probabilities that his employment was terminated because he is a Black man.

The school board requested the Tribunal deal with the application on a summary basis and without a full hearing because the application had no reasonable prospect of success. The Tribunal ultimately agreed after a brief hearing where the parties made submissions and presented documents and case law.

The Tribunal found that there was no reasonable prospect that the applicant would be able to prove on a balance of probabilities that his employment was terminated because he is a Black man, particularly when his behaviour was viewed in the context of the text messages sent by the applicant, and considering the age difference and power dynamic between him and the student. The applicant relied on bald factual allegations and speculations, and pointed to very little probative evidence to demonstrate that his race was a factor in the school board's decision to dismiss him. The Tribunal also noted that under the school board's progressive discipline policy, it was not required to utilize a specific step or level of discipline, and had the discretion to terminate an employee's employment where serious misconduct warranted such a response.

Lastly, the Tribunal found that the applicant had no reasonable prospect of proving his dismissal was a reprisal for claiming his rights under the *Human Rights Code.* The applicant's allegations of reprisal related to a request in 2011 for accommodation of an undiagnosed medical condition. The applicant was unable to point to any evidence suggesting he actually requested accommodation, or that his termination was retaliation for him having done so. Further, the applicant's allegation that the school board's decision to put the applicant in a temporary position in 2012 was retaliation was not related to any prohibited ground of discrimination and constituted a bald allegation. Similarly, the Tribunal dismissed the applicant's claim that the school board's decision to terminate his employment was retaliation for his request to be placed only in secondary schools in 2012 for reasons related to the birth of his child. Such allegation was entirely without foundation.

Stephanie Young
416.367.6032
syoung@blg.com

COURT APPROVES POLICE SEARCH OF CELL PHONE USED IN TEACHER PARKING LOT DRUG DEALS

Of interest to educators is a case involving teenagers allegedly dealing drugs in the teachers' parking lot of W.P. Wagner School on a summer evening in Nipawin, Saskatchewan. In *R v Jones*, 2015 SKPC 29, the accused were arrested following a search of their car and cell phone. The Provincial Court of Saskatchewan decision, dated March 3, 2015, includes a succinct summary of the case in the opening paragraph:

> Two teenagers are sitting inside a car in a school parking lot. A series of vehicles drive up to them, exchange something and then drive off. The police stop the car being driven by one of the teenagers, take away his cell phone and go through it. This case asks whether the police have the authority to do this.

The court held that the initial search was connected and incidental to the arrest.

The teens were charged with trafficking and possession of marijuana. They challenged the admissibility of the cell phone evidence, among other challenges, such as arbitrary detention arising from the vehicle stop. This article focuses on the Court's review of the warrantless cell phone search by police.

The RCMP officers who searched the teenagers' phones were responding to a 911 call made at 7:10 in the evening. The caller reported a white car parked in the school parking lot, and other vehicles pulling up alongside with exchanges taking place, and subsequently driving away leaving the white car in the parking lot. The obvious inference is that the occupants of the white vehicle were selling drugs in hand-to-hand exchanges with each car that drove up alongside.

The Court had no difficulty finding that the officers had reasonable suspicion of criminal activity. Upon observing the white car, there was no other explanation for its presence in the school parking lot. The Court concluded that "these were a succession of quick exchanges between cars in the teachers' parking lot of an elementary school in the evening in the middle of summer when the school was closed and no one else was around. It is more possible, and likely, that they were selling drugs from the Crown Victoria vehicle than they were selling items off ebay or passing notes from class at summer school."

SUPREME COURT TEST FOR POLICE SEARCHES OF CELL PHONES

As reported in the Winter 2015 Edition of the BLG Education Law Newsletter, the Supreme Court of Canada developed a new test for police searches of cell phones. In *R v Fearon,* 2014 SCC 77, the Supreme Court considered whether the existing power for police to search pursuant to a lawful arrest extends to cell phone searches.

At his criminal trial for armed robbery, Mr. Fearon argued the evidence from a police cell phone search was inadmissible because police did not have a warrant. Mr. Fearon challenged the cell phone search under section 8 of the *Canadian*

Charter of Rights and Freedoms, which states "Everyone has the right to be secure against unreasonable search or seizure."

The Supreme Court modified the existing common law framework for a lawful search and seizure, which states that a search incidental to an arrest must be:

1. Founded on a lawful arrest;
2. Be truly incidental to that arrest; and
3. Be conducted reasonably.

After *Fearon,* the new test for lawful search and seizure of a cell phone by police is:

1. The arrest was lawful;
2. The search is truly incidental to the arrest in that the police have a reason based on a valid law enforcement purpose to conduct the search, and that reason is objectively reasonable. The valid law enforcement purposes in this context are:
   (a) Protecting the police, the accused, or the public;
   (b) Preserving evidence; or
   (c) Discovering evidence, including locating additional suspects, in situations in which the investigation will be stymied or significantly hampered absent the ability to promptly search the cell phone incident to arrest.
3 The nature and the extent of the search are tailored to the purpose of the search; and
4. The police take detailed notes of what they have examined on the device and how it was searched.

Since *Fearon,* lower courts have been applying the new test in criminal cases where the evidence obtained as a result of a cell phone search is critical to a conviction.

The Court concluded that the officer's search was sufficiently tailored as required by *Fearon.*

SASKATCHEWAN COURT APPLIES TEST IN *FEARON*

The Court in *R v Jones* concluded that the police complied with all four requirements of *Fearon,* and decided the officer's search was limited, cursory and incident to a lawful arrest. Below is a detailed analysis of how the Court applied *Fearon.*

1. The arrest was lawful

The Court decided the accused were lawfully arrested based on the officer's observation of drug trafficking paraphernalia in plain sight and the smell of raw marijuana.

They searched the car and seized items such as baggies of individually rolled tinfoil balls, with roughly one gram of marijuana in each, marijuana pipes and cash.

One of the officers also found a cell phone belonging to one of the accused. The phone was on, and was not password protected. The officer viewed two recent text message conversations. In one text message conversation, an individual was asking the owner of the phone if they could buy a "30". In another text message conversation, a different individual was asking to buy a "40". The officer interpreted these messages as arranging to buy marijuana. The officer searched the phone again when at the police station, and viewed two similar text messages sent around the time the 911 call was made.

2. The search is truly incidental to arrest.

The Court decided that the initial search, which took place immediately after arrest, and another search six hours later fell within a reasonable period of time after the arrest such that they are "still connected and incidental to arrest." There was no substantial delay.

3. *The nature and the extent of the search are tailored to the purpose of the search.*

This aspect of the *Fearon* test was easily met. The officer was investigating marijuana trafficking, commonly referred to by law enforcement as "Dial-a-Dope". The Court noted that many cases involve admitting text messages as evidence in drug trafficking cases, stating "text messaging is the lifeflood of Dial-A-Dope drug dealers."

The Court concluded that the officer's search was sufficiently tailored as required by *Fearon*, stating as follows:

> … focussed and limited solely to the text messaging function of the phone. It consisted of him thumbing through some recent messages on the phone's text messaging feature. At no point did he access the phone's e-mail, photos, contact numbers, call log or any other applications on the phone.

4. *The police take detailed notes of what they have examined on the device and how it was searched.*

As stated in *Fearon,* the record of the search should generally include "the applications searched, the extent of the search, the time of the search, its purpose and its duration." The police officer wrote down word for word the content of the text messages he searched at the scene of the arrest, and immediately following his return to the station. That was the extent of his search, and the Court found his record keeping sufficient.

POLICE SHOULD NOT HAVE SENT CELL PHONE AWAY FOR FURTHER ANALYSIS

Although the search of the cell phone was lawful, the police were criticized by the Court for the subsequent action of sending the cell phone away for forensic analysis of the entire contents. The officer had already transcribed the text messages he felt indicated the accused were trafficking drugs. If he was concerned that the cell phone contents could be remotely wiped, he could have preserved the evidence by less invasive procedures, such as removing the battery and network card, or storing the phone in a "Faraday box"[1] while he waited for a warrant.

The Court decided that the officer's decision to send the cell phone away for forensic analysis "runs afoul" of the third requirement in *Fearon,* i.e. the tailored search. The following paragraph succinctly expresses the Court's concerns:

> Sending the phone away for analysis really runs afoul of condition #3 in *Fearon.* The search of the entire contents of the phone is so vast and extensive it cannot logically be said to be proportional or tailored to the original purpose for searching the phone incidental to arrest to gather evidence of drug trafficking. It is not necessary to go through all the applications on the phone, including all of the holder's personal photos, contacts, calendar, call logs and internet browsing history in order to find evidence of drug trafficking. As such, it cannot reasonably be said that this mobile device data analysis is merely an extension of the police authority to conduct a search of an item seized incident to arrest. The police are not merely looking inside someone's

Searches that are not tailored run the risk of being viewed as fishing expeditions.

[1] A "Faraday" box is used to shield an electronic device from electric fields. A cell phone placed in a Faraday box is protected from being remotely accessed or wiped of its contents, thus preserving potential evidence.

> car. They are looking inside someone's life. There being no legitimate purpose tailored to such an invasive search, I find the forensic analysis of the phone constitutes a breach of Hailey Jones' s. 8 *Charter* right.

Ultimately, the Court decided in this particular case to admit the cell phone evidence even though the forensic analysis runs afoul of the third part of the *Fearon* test. The officer was acting in good faith when he sent the phone for analysis, despite not having a warrant.

SIGNIFICANCE FOR EDUCATORS

The lesson for educators is that the courts are likely to focus on whether a search of a cell phone is tailored. Searches that are not tailored run the risk of being viewed as fishing expeditions that go beyond the purpose of the search. As the Court stated in *Jones*, a search of a cell phone is not merely looking inside someone's car, but inside their life. Overly broad searches that review personal information will be considered intrusive and invasive. In the criminal context, the risk is that the information would not be admitted as evidence, thus jeopardizing the conviction. For educators, there is a risk that it would be considered unfair or improper to use information obtained during broad searches of a student's cell phone.

Kate Dearden
416.367.6228
kdearden@blg.com

The SBCBA requires the Ontario Labour Relations Board to take certain factors into consideration in determining whether an issue is to be bargained centrally or locally.

OLRB RELEASES FIRST FULL REASONS DECISION REGARDING THE SCOPE OF LOCAL/CENTRAL BARGAINING FOR CUPE BARGAINING UNITS IN THE EDUCATION SECTOR

Since the enactment of the *School Boards Collective Bargaining Act*, S.O. 2014 c.5, (the "SBCBA"), which governs the current round of collective bargaining in the education sector, the Ontario Labour Relations Board ("the Board"), has made a number of decisions on whether certain teacher and education worker unions should bargain issues with school boards centrally or locally. Throughout spring and summer 2015, the Board released these "bottom line" decisions quickly, in an effort to get the parties back to the bargaining table, particularly considering the slow pace of this round of bargaining. However, these bottom line decisions provided limited insight into the Board's reasoning in what issues should be bargained locally and centrally.

On June 29, 2015, the Board released its first "full reasons" decision on the scope of local and central bargaining an application brought by the Canadian Union of Public Employees (CUPE) vis-à-vis its negotiations with the Council of Trustees Associations ("CTA")[1], the statutorily designated association for all school board employers of all CUPE bargaining units. The decision provides significant guidance with respect to the Board's interpretation of the SBCBA, and will likely serve as an important precedent with respect to a number of issues related to two-tier bargaining.

In the application, CUPE had asked the Board to determine that the following issues were appropriate for central bargaining:

1. Limits on attendance management/support program;
2. Violence in the workplace – policies, procedures, preventative measures and training;
3. Non-instructional supervision of students;
4. Employees performing medical interventions;
5. Standardization of job descriptions and classifications;
6. Absence replacement in connection to workload;
7. Contracting in/out and sharing of trades services;
8. Creation of a preventative maintenance program;
9. Requirement for CUPE staffing during permits/leases; and
10. Creation of a provincial pay equity maintenance joint committee.[2]

The CTA and the Crown submitted that the above-noted matters should be dealt with in local bargaining. Additionally, the CTA and the Crown asked the Board to rule that the following matters relating to salary, wages and direct compensation should be bargained centrally:

1. Premiums (including shifts, overtime, weekends, overnights);
2. Allowances (excluding new allowances in response to a singular need that does not apply to an entire class or classes of employee);
3. Paid vacation and holidays (including statutory holidays).

Prior to the Board hearing, the parties were able to resolve the issue of the requirement for CUPE staffing during permits/leases.

THE BOARD'S DECISION

The Board released its decision (the "Decision") on June 29, 2015, following three days of hearing. The Board agreed almost exclusively with the positions taken by the CTA.

Section 28(8) of the SBCBA requires the Board to take the following factors into consideration when determining whether an issue is to be bargained centrally or locally:

1. The extent to which the matter could result in a significant impact on the implementation of provincial education policy.
2. The extent to which the matter could result in a significant impact on expenditures for one or more school boards.

The decision provides significant guidance with respect to the Board's interpretation of the SBCBA.

[1] Pursuant to the *School Boards Collective Bargaining Act* S.O. 2014 c.5, ("SBCBA"), the CTA is composed of L'Association des Conseils Scolaires des ecole public de l'Ontario, ("ACEPO"), L'Association Franco-Ontarienne des Conseils Scolaires Catholiques, ("AFOCSC"), the Ontario Catholic Trustees' Association ("OCSTA), and the Ontario Public School Boards' Association ("OPSBA").

[2] On this issue, CUPE later clarified that it was referring not the creation of a provincial joint committee, but to the inclusion of CUPE members at local provincial pay equity committees.

3. Whether the matter raises common issues between the parties to the collective agreements that can more appropriately be addressed in central bargaining than in local bargaining.

Under the SBCBA, the Board may also consider any other factors which are "relevant in the circumstances", effectively inviting the Board to perform a contextual analysis at its discretion.

In its decision, the Board engaged in a thorough analysis of the weight to be given to each of the above factors and noted that each application would present the Board with a different "contextual picture", which would in turn require the Board to engage in a different balancing of the factors established by section 28(8) of the SBCBA. In the CUPE Application, the Board noted that the contextual picture presented was characterized by the fact that each of the four trustee associations which comprised the CTA represented its own distinct group of school boards with a different mandate, "culture" and demographics. The Board noted that the boards' diversity complicated CUPE's ability to forcefully argue that the items raised in the CUPE Application were more appropriately raised at the central table.

The Board engaged in a thorough analysis of the weight to be given to the relevant factors.

The Board also noted that the extent to which the matter could result in a significant impact on expenditures for one or more school boards would necessarily require some degree of speculation, and that the Board would ultimately consider and balance all the factors found in section 28(8) of the SBCBA. The Board noted that the circumstances of the CUPE Application presented a special challenge for the Board in being able to appropriately balance the required factors, since CUPE had not yet drafted its actual proposals on a number of the issues in the CUPE Application.

THE ISSUES TO BE BARGAINED

Attendance management programs:

The Board agreed with the CTA's position that CUPE had failed to show the likelihood of significant savings over the remaining two years of an agreement, and further, that although all 63 school boards maintained some form of attendance management policy and support programs, such policies and practices were administered within the context of individual cases, which were by their very nature "local".

Violence and the workplace procedures and policies:

CUPE had submitted that it wished to negotiate centrally "best practices" protected by contract language, and training funds for all its members so that they would be better able to implement the policies and procedures relating to workplace violence. The Board agreed with the CTA's position that the matter of training costs was severable from the remainder of CUPE's request and directed that CUPE's request to be able to negotiate funds for training in relation to policies, procedures, and preventative measures be addressed at the central bargaining table, while all other proposals regarding the topic were to be addressed at the local bargaining table.

Non-instructional supervision of students by ECEs and EAs during instructional time:

The Board noted that the nature and allocation of supervision duties for both ECEs and EAs depends upon factors which vary depending upon the individual school board. Furthermore, considering the novelty of the ECE program, there was not yet an analysis of the effectiveness of ECEs and EAs during the instructional day across the boards.

The Board also noted, however, that in the event that the Ministry of Education introduced relevant regulations on the subject of supervision, CUPE could request that the matter be re-visited by the Board.

Employees performing medical interventions:

CUPE had submitted that its members were not receiving standardized and proper training across the province, and that Ministry of Education policies were not being implemented consistently. The Board held that if CUPE sought to negotiate training funds for its members performing medical interventions, it would do so at the central bargaining table, but that given the lack of detail in CUPE's proposal, all other aspects of the topic were to be addressed at the local bargaining table.

Standardization of job descriptions and classifications:

CUPE had submitted that its goal was to ensure that the "same work" would attract the "same pay". The Board noted that on balance, the task of attempting to standardize job descriptions and classifications across four trustee associations and 63 school boards was a "massive undertaking", and was likely unrealistic. The Board further agreed with the CTA that the issue of job descriptions and classifications was inherently local.

Absence replacement in connection with workload:

CUPE had submitted that it wished to curtail school boards' ability to simply spread the work of an absent employee across those working on the days in question. CUPE asserted that if successful, absence replacement would have a significant impact upon expenditures, and would enhance students' educational experience.

The Board noted that CUPE's position called for a large degree of speculation, that there was no evidence of the possible degree of increased costs, or how students' educational experience would be enhanced. The Board therefore agreed with the CTA's position that the manner in which individual school boards address the issue of absent employees was extremely varied across the province, including variations as between schools within a particular board, and that the issue was therefore appropriate for local bargaining.

Contracting out and sharing of trades services and creation of a preventive maintenance program:

The Board agreed with the CTA's position that the 109 collective agreements in force between CUPE and the CTA school boards varied widely in the contract language addressing the topic. Furthermore, given the variety of needs across all boards in the province, the issue of sharing trades as between school boards could only be addressed locally.

Negotiating a central provision on Pay equity: CUPE argued in favor of a provision that would require each school board to create a joint union-employer pay equity maintenance committee. The CTA had submitted that, per the *Pay Equity Act,* R.S.O. 1990, c.P.7 (the "Act"), pay equity maintenance was the sole responsibility of a school board, and that nothing in the Act required an employer to establish a joint pay equity maintenance committee with its union. The CTA had further argued that the scheme of the pay equity statute was only applicable at the local level as it was within the mandate of each school board and that the local human resource personnel of each school board was in the best position to address issues of pay equity maintenance.

The Board held that the issue of job descriptions and classifications was inherently local.

The Board disagreed with the CTA's position, noting that the fact that the Act does not mandate a joint employer-union pay equity maintenance committee does not preclude a union from suggesting the creation of such an entity. Regardless, the Board agreed with the CTA that the issue was more appropriately addressed at the local bargaining table.

Finally, with respect to the Crown's request that remaining unresolved financial matters be negotiated at the central table, the Board agreed that the following matters, including premiums, allowances (excluding new allowances), paid vacations and holidays, and short-term leaves, should be negotiated locally. The Board noted that in enacting the SBCBA the legislature could not have intended to bi-furcate collective bargaining concerning financial matters. Furthermore, school boards would have no way of knowing to what extent they could negotiate any meaningful financial expense locally without the presence of the Ministry of Education.

The Board's decision presents an important insight into the Board's interpretation of the scope of local and central bargaining.

SIGNIFICANCE OF THE DECISION

The Board's decision is the first extensive ruling on the interpretation of the factors set out at s.28(8) of the SBCBA and presents an important insight into the Board's interpretation of the scope of local and central bargaining. It also clearly demonstrates that the Board does not hold the view that just because negotiating matters centrally is more practical from a tactical perspective, such matters are necessarily more appropriate for central collective bargaining. With the exception of the negotiation of monetary issues, the decision places the onus back on the parties to negotiate deals at their respective local tables and which are reflective of their local circumstances.

Since the release of the Board's decision, CUPE has requested a no-board report so that the 55,000 members it represents could be in a legal strike position soon after the school year resumes. The developments have lived up to Education Minister's Sandals prediction in June 2015 that the present round of education sector negotiations would be "challenging" in the present "net zero" fiscal environment.[3]

Maria Gergin
416.367.6449
mgergin@blg.com

[3] "School support staff push for labour deal before fall." *Toronto Star,* July 27, 2015 <http://www.thestar.com/yourtoronto/education/2015/07/27/school-support-staff-push-for-labour-deal-before-fall.html>.

BORDEN LADNER GERVAIS EDUCATION FOCUS GROUP

LEADERS

National Leader	Eric M. Roher	416.367.6004	eroher@blg.com
Toronto	Robert Weir	416.367.6248	rweir@blg.com
Calgary	Laurie Robson	403.232.9482	lrobson@blg.com
Montréal	Mark Phillips	514.954.3198	mphillips@blg.com
Ottawa	Noëlle Caloren	613.787.3536	ncaloren@blg.com
Vancouver	Sean Muggah	604.640.4020	smuggah@blg.com

CALGARY

	Laurie Robson	403.232.9482	lrobson@blg.com

MONTRÉAL

	François Longpré	514.954.2543	flongpre@blg.com
	Mark Phillips	514.954.3198	mphillips@blg.com
	Patrick Trent	514.954.3154	ptrent@blg.com

OTTAWA

	Noëlle Caloren	613.787.3536	ncaloren@blg.com
	Yves J. Ménard	613.787.3518	ymenard@blg.com

TORONTO

	Madlyn Axelrod	416.367.6168	maxelrod@blg.com
	S. Margot Blight	416.367.6114	mblight@blg.com
	Cindy D. Clarke	416.367.6203	cclarke@blg.com
	Kate Dearden	416.367.6228	kdearden@blg.com
	Bethan Dinning	416.367.6226	bdinning@blg.com
	Heather Douglas	416.367.6177	hdouglas@blg.com
	James Fu	416.367.6513	jfu@blg.com
	Maria Gergin	416.367.6449	mgergin@blg.com
	Adam Guy	416.367.6601	aguy@blg.com
	Michelle Henry	416.367.6531	mhenry@blg.com
	Markus F. Kremer	416.367.6658	mkremer@blg.com
	Natasha Miklaucic	416.367.6233	nmiklaucic@blg.com
	Victoria Prince	416.367.6648	vprince@blg.com
	Eric M. Roher	416.367.6004	eroher@blg.com
	Melanie Warner	416.367.6679	mwarner@blg.com
	Robert Weir	416.367.6248	rweir@blg.com
	Stephanie Young	416.367.6032	syoung@blg.com

VANCOUVER

	Sean Muggah	604.640.4020	smuggah@blg.com
	Michelle Maniago	604.640.4139	mmaniago@blg.com
	Shelley-Mae Mitchell	604.640.4160	smitchell@blg.com
	Steve M. Winder	604.640.4118	swinder@blg.com

BORDEN LADNER GERVAIS LLP
LAWYERS | PATENT & TRADEMARK AGENTS

Calgary
Centennial Place, East Tower
1900, 520 – 3rd Ave S W, Calgary, AB, Canada T2P 0R3
T 403.232.9500 | F 403.266.1395

Montréal
1000, De La Gauchetière St W, Suite 900
Montréal, QC, Canada H3B 5H4
T 514.879.1212 | F 514.954.1905

Ottawa
World Exchange Plaza, 100 Queen St, Suite 1300
Ottawa, ON, Canada K1P 1J9
T 613.237.5160 | F 613.230.8842 (Legal)
F 613.787.3558 (IP) | ipinfo@blg.com (IP)

Toronto
Scotia Plaza, 40 King St W, Toronto, ON, Canada M5H 3Y4
T 416.367.6000 | F 416.367.6749

Vancouver
1200 Waterfront Centre, 200 Burrard St, P.O. Box 48600
Vancouver, BC, Canada V7X 1T2
T 604.687.5744 | F 604.687.1415

blg.com

Borden Ladner Gervais